Thamesa Designs Sdn Bhd & Ors v Kuching Hotels Sdn Bhd

SUPREME COURT (KUCHING) — CIVIL APPEAL NO 02–467–91
JEMURI SERJAN CJ (BORNEO), EDGAR JOSEPH JR AND MOHAMED DZAIDDIN SCJJ
22 JULY 1993

Civil Procedure *— Garnishee proceedings — Building contract — Retention money — Delay in completion of contract works due to delay in handing over of site by employer — Validity of final certificate — Right of employer to liquidated damages*

Civil Procedure *— Building contract — Arbitration clause — Failure to object to recourse to court — Jurisdiction of court*

The appellants were the nominated sub-contractors of the judgment debtor under a written contract between the appellants and the judgment debtor in respect of interior decoration works, fabrication, supply and installation of furniture and fittings to the Kuching Holiday Inn. As a result of non-payment for works done, the appellants sued the judgment debtor and obtained judgment for a total of RM320,720.98 which had remained unsatisfied. They then proceeded with garnishee actions against the respondents, the employer of the judgment debtor, to garnish the retention money in the hands of the respondents which was due to the judgment debtor under the contract. The garnishee orders were served on the respondents.

At the trial, the common issue was whether there was any money due or accruing to the judgment debtor from the respondent at the time the respective garnishee orders were served on the respondent. The respondent contended that there was no money to be attached because the retention fund of RM217,607.84 had been utilized to pay for the cost of rectification of defects (RM50,373.10) and for liquidated damages (RM180,000) to account for 36 days' delay in completion of the works as shown in the final certificate of payment issued by the design consultants. The appellants did not dispute the payment for rectification of defects, but they challenged the validity of the final certificate in respect of the imposition of 36 days' liquidated damages. The learned trial judge held that the certificate of final completion was valid and binding and therefore there was no money for the appellants to garnish. The appellants have appealed.

Held, allowing the appeal:

(1) Here, the facts showed that the employer handed over the site late which led to the delay on the part of the contractor to complete the works and therefore, it is patently clear that the employer should not be entitled to claim for liquidated damages under the said contract, because by his omission to give possession of the site in time, the time for completion becomes at large and there was no date from which the damages could be assessed.

(2) The respondents had therefore lost their right to claim for liquidated damages. In the result, the certificate of final payment issued by the consultant upon which payment of RM180,000 was authorized as liquidated damages had become invalid and was not binding on the parties. The sum of RM180,000 which was deducted from the retention fund by the respondents as liquidated damages will have to be restored to the retention fund for the appellants to garnish.

(3) The parties to the proceedings before the learned judge had never questioned its jurisdiction and had, by their conduct, waived their rights to go to arbitration. It was therefore too late for the respondents to raise an issue in the face of the arbitration clause in the said contract that the court had no jurisdiction to hear the matter.

[Bahasa Malaysia summary

Perayu adalah sub-kontraktor yang dinamakan bagi penghutang penghakiman di bawah suatu kontrak bertulis antara perayu dan penghutang penghakiman itu berhubungan dengan kerja-kerja perhiasan dalam, rekaan dan pembekalan serta pemasangan perabot dan alat perkakas untuk Holiday Inn Kuching. Oleh kerana mereka tidak dibayar untuk kerja-kerja yang telah dibuat, perayu telah mendakwa penghutang penghakiman itu dan telah mendapat penghakiman untuk jumlah RM320,720.98 yang masih belum dijelaskan. Mereka kemudiannya telah membuat tuntutan garnisan terhadap responden, iaitu majikan penghutang penghakiman itu untuk menggarnis wang yang disimpan di dalam tangan responden yang perlu dibayar kepada penghutang penghakiman di bawah kontrak itu. Perintah-perintah garnisan itu telah disampaikan kepada responden.

Di dalam perbicaraan, isu yang dipersetujui bersama adalah sama ada terdapat sebarang wang yang perlu dibayar atau terakru kepada penghutang penghakiman dari responden pada masa perintah-perintah garnisan itu disampaikan kepada responden. Responden mendakwa bahawa tidak ada wang yang boleh digarnis kerana wang sebanyak RM217,607.84 yang disimpan itu telah digunakan untuk membayar kos kerja membaiki kerosakan (RM50,373.10) dan untuk gantirugi jumlah tertentu (RM180,000) bagi kelambatan selama 36 hari dalam menyiapkan kerja-kerja sepertimana yang ditunjukkan di dalam sijil pembayaran penutup yang dikeluarkan oleh perunding rekabentuk. Perayu-perayu tidak menyoal pembayaran kos kerja membaiki kerosakan tetapi menyoal keesahan sijil pembayaran penutup itu mengenai gantirugi jumlah tertentu 36 hari itu. Hakim yang arif memutuskan bahawa sijil penutup itu adalah sah dan mengikat dan oleh kerana itu tidak ada wang yang boleh digarnis oleh perayu. Perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Fakta-fakta menunjukkan bahawa majikan itu telah menyerahkan tempat kerja itu lewat dan ini menyebabkan kelewatan kontraktor

dalam menghabiskan kerja-kerja itu dan oleh itu, adalah sangat jelas bahawa majikan itu tidak berhak menuntut gantirugi jumlah tertentu di bawah kontrak itu, kerana melalui kegagalan beliau untuk menyerahkan tempat kerja itu pada masa yang sepatutnya, masa untuk menghabiskan kerja-kerja itu tidak dapat ditentukan dan tidak terdapat tarikh dari mana gantirugi itu boleh dikira.

(2) Oleh itu, responden telah hilang hak mereka untuk menuntut gantirugi jumlah tertentu. Oleh kerana itu juga, sijil penutup yang dikeluarkan oleh perunding atas mana pembayaran RM180,000 itu dibenarkan sebagai gantirugi jumlah tertentu telah menjadi tidak sah dan tidak mengikat pihak-pihak itu. Jumlah wang RM180,000 yang dikeluarkan dari wang yang disimpan oleh responden itu sebagai gantirugi jumlah tertentu hendaklah dikembalikan ke dalam tabung simpanan itu untuk digarnis oleh perayu.

(3) Pihak-pihak di dalam prosiding di hadapan hakim yang arif tidak pernah mempertikaikan bidangkuasanya dan melalui kelakuan mereka, telah mengabaikan hak mereka untuk bertimbangtara. Oleh kerana itu, sudah terlewat untuk responden menimbulkan isu bahawa memandangkan peruntukan timbangtara di dalam kontrak itu, mahkamah tidak mempunyai bidangkuasa di dalam perkara itu.]

Notes

For a case on garnishment of the retention sum held by employers in building contracts, see 2 *Mallal's Digest* (4th Ed) para 921.

Cases referred to

1 *East Ham Borough Council v Bernard Sunley & Sons, Ltd* [1965] 3 All ER 619 (not folld)
2 *Sim Chio Huat v Wong Ted Fui* [1983] 1 MLJ 151 (folld)
3 *Dodd v Churton* [1897] 1 QB 562 (folld)
4 *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474 (folld)

Appeal from: Civil Suit No KG 102 of 1986 (consolidated) (High Court, Kuching)

Christina Eng (*Cf Eng*) for the appellants.
Benedict Lim (*Tiong, Lim, Wong & Co*) for the respondents.

Cur Adv Vult

Mohamed Dzaiddin SCJ (delivering the judgment of the court): This is an appeal from the decision of Haidar J made on 14 October 1991 in consolidated garnishee proceedings, refusing to make absolute the appellants' garnishee orders nisi against the respondents.

The four appellants were the nominated sub-contractors of the judgment debtor under a written contract made on 18 August 1984 ('the said contract') between the respondents/garnishee and the judgment debtor in respect of

interior decoration works, fabrication, supply and installation of furniture and fittings to the Kuching Holiday Inn Hotel extension project. As a result of non-payment for works done, the appellants respectively sued the judgment debtor and obtained judgment for a total sum of RM320,720.98 which had remained unsatisfied. They then proceeded with garnishee actions against the respondents/garnishee, the employer of the judgment debtor, to garnish the retention money in the hands of the respondents/garnishee which was due to the judgment debtor under the said contract. The respective garnishee orders nisi were served on the respondents/garnishee on 13 January 1987, 13 February 1981 and 3 May 1991.

At the trial before the learned judge, the common issue between the parties was simply whether there was any money due or accruing due to the judgment debtor from the respondents/garnishee at the time the respective orders nisi were served on the latter. It was contended on behalf of the respondents/garnishee that there was no money to be attached at the time the orders nisi were made because the retention fund of RM217,607.84 held by the respondents/garnishee had been utilized to pay for the cost of rectification of defects (RM50,373.10) and for liquidated damages (RM180,000) to account for 36 days' delay in completion of the works as shown in the final certificate of payment issued by the design consultants dated 23 May 1989.

Cik Christina Eng, counsel for the appellants, informed the learned judge that the appellants had no quarrel with the payment of RM50,373.10 being the cost of rectification of defects but would be challenging the validity of the final certificate of payment in respect of the imposition of 36 days' liquidated damages amounting to RM180,000, and indicated that in the event of the court holding that the final certificate was valid, then there would not be any moneys to be garnished. On that basis, the learned judge proceeded to consider the validity of this final certificate.

In his grounds of decision, the learned judge stated at p 5:

> The final certificate was issued on 23 May 1989 and it would seem to show that there was no money due to SC and in fact SC owed KHSB a sum of RM349.26 (pp 66–69 of D1). It is not disputed that there is a 5% retention fund of the contract held by KHSB for the due performance of the contract. The retention fund is RM217,607.84. KHSB contended that by virtue of the costs of rectification of defects (RM50,373.10) and the imposition of the liquidated and ascertained damages for 36 days of delay by SC as provided in the contract, the amount of which is RM180,000, the retention fund of RM217,607.84 is thereby extinguished. This is allegedly reflected in the final certificate issued on 23 May 1989 (pp 66–69 of D1). Therefore KHSB further contended that they were entitled to deduct the cost of rectification of defects in the sum of RM50,373.10 and the imposition of liquidated and ascertained damages in the sum of RM180,000 from the retention sum of RM217,607.84. Is KHSB entitled to deduct the said sums from the retention money held by KHSB ? According to cll 22 and 28(i)(a) of the contract (see pp 13 and 16 of P5) KHSB claimed that they were entitled to so deduct the said amount due to SC from the retention sum. In my view KHSB is not wrong in their claim as a such claim is supported by the view expressed by Dennis F Tunner in *Building Contracts — A Practical Guide* (3rd Ed) at pp 21–23 and pp 234–235. Towards this end, at p 235 of the book under the heading 'Rules governing the retention moneys', it is stated:

A 'The second protection is to the employer who may go to the fund for such matters as the remedying of defects and liquidated damages if no other moneys are outstanding to the contractor.'

On the question of the conclusiveness of this certificate of final completion, the learned judge relied on the opinion of Lord Upjohn in *East Ham* B *Borough Council v Bernard Sunley & Sons, Ltd*,[1] which reads as follows:

> The first question is whether, on the true construction of the conditions, a final certificate issued by the architect is conclusive evidence as to the sufficiency of the works subject only to the exceptions mentioned in cl 24(f) of the contract. Melford Stevenson J came to the conclusion that it was not, but thought that it was only conclusive evidence as between the building owner and the builder until C power to re-open it vested in an arbitrator appointed pursuant to cl 27. In the Court of Appeal, reversing Melford Stevenson J on this point, it was unanimously decided that a final certificate was final and conclusive save as to the exceptions stated in the sub-clause.

The learned judge also took note of the arbitration clause in the said D contract (cl 29), but relying on the commentary in *The Malaysian Standard Form of Building Contract* by Prof Vincent Powell-Smith, (1990), MLJ at p 152, he held that the final certificate was nonetheless not reviewable by the arbitrator and even by the court.

In the result, the learned judge ruled that the certificate of final completion E was valid and binding and therefore there was no money for the appellants to garnish either in January 1987 or in 1991.

Before us, Cik Eng submitted that the learned judge erred in law in failing to consider the effect of the late handing over of the site by the employer to the contractor under the said contract, which had affected the validity of the final certificate. Counsel pointed out that under the said F contract, the date of commencement of works was 18 August 1984 and for completion was 18 April 1985. It was not disputed that by 20 April 1985, the rooms on the fourth to the tenth floors of the building were still not handed over to the appellants for them to start work. Yet, despite the late handing-over of the site by the employer, liquidated damages of RM180,000 G had been imposed against the judgment debtor for late completion of works for 36 days as reflected in the certificate of final completion.

Counsel then referred to cll 21 and 23 of the said contract and pointed out that the reasons excusing delays in cl 23 did not cover any delay due to late handing-over of the site by the employer. Relying on the authorities which we shall examine shortly, counsel submitted that once there was a H late handing-over of the site by the employer, he was in breach of contract, the effect of which was to allow time to be set at large and the employer would lose his right to liquidated damages. In such circumstances, the respondents/garnishee were not entitled to liquidated damages and to deduct the same from the retention fund. It would follow that there was still money I due or accruing due to the judgment debtor held in the retention fund which could be garnished by the appellants.

Encik Benedict Lim, for the respondents/garnishee, reiterated that there was no money to be garnished from the respondents/garnishee at the

relevant dates. He submitted that the onus was on the appellants to show that there was money due to the judgment debtor and where no money was due, there was nothing to be attached. At any rate, he stated that the judgment debtor never challenged the certificates issued by the consultant interior designer, particularly the certificate of final completion, which conclusively showed a sum of RM180,000 was awarded to the respondents/ garnishee as liquidated damages for delay. Finally, counsel submitted that the learned judge had come to a correct decision which should not be disturbed.

The said contract is a standard building contract which is adopted from the Pertubuhan Akitek Malaysia's (PAM) Malaysian Standard Form of Building Contract.

Clauses 21 and 23 of the said contract state:

21 Possession, completion and postponement

(1) On the date for possession stated in the appendix to these conditions possession of the site shall be given to the contractor who shall thereupon begin the works and regularly and diligently proceed with the same, and who shall complete the same on or before the date for completion stated in the said appendix subject nevertheless to the provisions for extension of time contained in cl 23 of these conditions.

(2) The employer may issue instructions in regard to the postponement of any work to be executed under the provisions of this contract.

...

23 Extension of time

Upon it becoming reasonably apparent that the progress of the works is delayed, the contractor shall forthwith give written notice of the cause of the delay to the employer, and if in the opinion of the employer the completion of the works is likely to be or has been delayed beyond the date for completion stated in the appendix to these conditions or beyond any extended time previously fixed under this clause,

(a) by force majeure, or
(b) by reason of any exceptionally inclement weather, or
(c) by reason of loss or damage occasioned by any one or more of the contingencies referred to in cl 20 of these conditions, or
(d) by reason of civil commotion, local combination of workmen, strike or lockout affecting any of the trades employed upon the works or any of the trades engaged in the preparation, manufacture or transportation of any of the goods or materials required for the works, or
(e) by reason of the employer's instructions issued under cll 1(2), 11(1) or 21(2) of these conditions, or
(f) by reason of the contractor not having received in due time necessary instructions, drawings, details or levels from the employer and/or interior designer for which he specifically applied in writing on a date which having regard to the date for completion stated in the appendix to these conditions or to any extension of time when fixed under this clause was neither unreasonably distant from nor unreasonably close to the date on which it was necessary for him to receive the same, or
(g) by delay on the part of artists, tradesmen or others engaged by the employer in executing work not forming part of this contract, or

(h) by reason of the opening up for inspection of any work covered up or of the testing of any of the work materials or goods in accordance with cl 6(3) of these conditions (including goods in consequence of such opening up or testing), unless the inspection or test showed that the work materials or goods were not in accordance with this contract,

then the employer shall so soon as he is able to estimate the length of the delay beyond the date or time aforesaid make in writing a fair and reasonable extension of time for completion of the works. Provided always that the contractor shall use constantly his best endeavour to prevent delay and shall do all that may reasonably be required to proceed with the work.

Prof Vincent Powell-Smith, in his book *The Malaysian Standard Form of Building Contract*, discussed in detail the meaning and effect of the clauses forming the PAM's Standard Form of Building Contract, reproducing the text of each clause for easy understanding. His commentary on cl 21 is stated at pp 78–79 as follows:

Clause 21(1) sets out the employer's obligation to give possession of the site to the contractor. The contractor is then obliged to begin the works, proceed 'regularly and diligently' with them so as to complete the works 'on or before' the completion date set out in the appendix. The dates for possession of the site and for completion must be specified in the appendix and, subject to the grant of any extension of time under cll 23 or 32(1)(c) (which permits an extension of time for reinstatement of war damage), the contractor is bound to complete the work by the specified completion date. If he fails to do so, he will be liable for liquidated damages to the employer under cl 22.

This is subject to the exception that the employer is not entitled to liquidated damages if by his acts or omissions he has prevented the contractor from completing his work by the completion date unless an extension of time is both grantable and has been granted for any delay caused by that act or omission: see the old English cases of *Holme v Guppy* (1838) 2 M&W 387; *Wells v Army & Navy Co-operative Society* (1902) 86 LT 764.

The employer's failure to give possession of the site is not covered by the provisions of cl 21(2) which merely entitles the architect to postpone 'any work to be executed under the provisions of the contract'.

... One result of this is that the architect has no power to grant an extension of time under cl 23 for the employer's failure to give possession, and consequently for the reasons set out in the discussion of cl 23, time will be 'at large' and the employer will lose his right to liquidated damages.

On cl 23, the learned author made the following comment (at p 88):

Clause 23 provides for the architect to grant an extension of time on specified grounds and an extension of time is grantable on those grounds and no other. The architect has no inherent power to extend the period for completion and in the absence of an express provision such as cl 23 he would have no power to do so. Failure by the architect properly to exercise the power to extend time, where any delay to completion is caused by the employer or those for whom he is responsible in law, relieves the contractor from his liability to pay or allow liquidated damages (*Dodd v Churton* [1897] 1 QB 562) and the time for completion becomes 'at large', ie the contractor's obligation is then to complete 'within a reasonable time'.

... Clause 23 is gravely defective in many important respects and is in need of urgent amendment. The grounds on which an extension may be granted are

very limited and do not cover many common delaying events, eg failure by the employer to supply materials to the contractor, failure to give agreed access and failure to give possession of the site on the due date. If such events occur and cause delay to completion the architect has no power to grant an extension of time with the result that time will be 'at large' and the employer will lose his right to liquidated damages. This is made clear by the leading English case of *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* [1970] 1 BLR 11 and it is somewhat surprising that cl 23 should continue to be used in its present form.

A similar point as in this appeal was before the Federal Court in *Sim Chio Huat v Wong Ted Fui*,[2] where the appellant, a housing developer, undertook to deliver houses in Kuching to be erected by him for the respondents, within six months, in the case of two units of double-storey detached houses and twelve months, in the case of two units of terrace houses, from the date of approval of plans by the Kuching Rural District Council. Clause 24 of the agreement stipulated that time wherever specified shall be of the essence of the contract. In addition, the agreement contained no provision for extension of the delivery period nor any provision as to alterations and additional works. In the event, the appellant was unable to deliver these houses in time. The appellant also carried out extra work and incurred certain expenses which he claimed against the respondent. The respondent denied liability and counterclaimed a sum of RM28,800 as liquidated damages and also general damages because of the failure of the appellant to deliver the houses in time. The appellant's reply was that the respondent was not entitled to the damages claimed because there had been a waiver and estoppel on the part of the respondent. The learned trial judge upheld the respondent's counterclaim and awarded both liquidated and general damages. The appellant's appeal to the Federal Court was allowed. On the question of damages, the court stated at p 154 as follows:

In dealing with this question we can do no better than be guided by the statement of the law in *Hudson's Building and Engineering Contracts*, 10th Ed, at p 624, which is as follows:

'It has been seen that, for the purpose of treating the contract as repudiated, in the rare cases where time is of the essence, the contract time for completion may cease to be applicable for a variety of reasons, including the ordering of extras or other interference or prevention by the employer. In the case of damages, it is equally obvious that where the reason is some act of the employer or his architect or engineer preventing completion by the due date, it cannot be the intention of the parties that liquidated or other damages should be calculated from that date even if the act, such as ordering extras, is not a breach of contract. Liquidated damages stipulated for at a rate for each day or week of delay in completing the works must begin to run from some definite date. It follows, therefore, that if the date in the contract has for some such reason ceased to be the proper date for the completion of the works, and no contractual provision exists for the substitution of a new date, there is in such a case no date from which liquidated damages can run and the right to liquidated damages will have gone. This, rather than solicitude for the contractor, is the reason for the provision usually known as the extension of time clause.'

A The learned author gives a list of cases in which the court refused damages and another list in which it allowed them ...

Amongst the conclusions reached by the learned author after considering these cases is that in cases where an agreement contains no clause for extension of time for completion, the acts of prevention by the employer whether authorized by the contract or whether in breach of it or whether the prevention is a cause of B part or of the whole of the delay invalidate the liquidated damages clause because by such acts, in the words of Parke B in *Holme v Guppy* (1838) 3 M&W 387; 150 ER 1195, and Lord Denning MR in *Trollope and Colls* [1973] 2 All ER 260, 'the time becomes at large'. Consequently there is no date from which damages could run and therefore no damages could be claimed.

In the present case, not only did the agreement contain no extension clause C it also contained no clause authorizing extra work. This extra work must at least have caused part of the delay though it might not have caused the whole delay.

On the question of delay in delivery of site, the court observed at p 155 that it was also the appellant's case that the delay was caused by the respondent having delivered the site rather late, thus leaving little time for the appellant D to complete the work. The court considered and applied the principle in *Dodd v Churton*,[3] and stated at p 156:

> At the risk of repetition we restate the principle in that where one party to a contract is prevented from performing it by the act of the other, he is not liable in law for the default.

E On the same page, the court reiterated that:

> Only in circumstances in which the employer or his agent is in no way to blame for the delay would the court be willing to allow damages. If the employer contributes to the delay by ordering extra work or is guilty of the delay in delivering possession of the site, or of any other cause no damages could be F claimed. (See *Hudson* at pp 624–628.)

To recapitulate, in the present case, it is not disputed that under the said contract, the date for completion of the works was 18 April 1985. Yet, by such date, most floors of the hotel were still not handed over to the judgment debtor. It is also common ground that there is no provision in the said contract, particularly cll 21 and 23 for any extension of time to G complete the works on account of delay in handing-over of the site. In fact, the evidence of Patrick William Bone (GW1), the design consultant (at p 53 of the appeal record), confirmed that there was no extension of time given for the late handing-over. He agreed that all the areas were handed over late. Thus, if the employer handed over the site late which led to the delay H on the part of the contractor to complete the works, it is patently clear, based on the principles cited above, that the employer should not be entitled to claim for liquidated damages under the said contract because, by his omission to give possession of the site on time, the time for completion becomes 'at large' and there was no date from which the damages could be assessed.

I As such, the respondents/garnishee in the present case have lost their right to claim for liquidated damages. In the result, the certificate of final payment issued by the consultant interior designer, upon which payment of

RM180,000 was authorized as liquidated damages, had become invalid and was not binding on the parties. Accordingly, we hold that the sum of RM180,000, which was deducted from the retention fund by the respondents/garnishee as liquidated damages, will have to be restored to the retention fund for the appellants to garnish.

On the question of the jurisdiction of the court, it seems clear to us that the parties to the proceedings before the learned judge had never questioned its jurisdiction. On 10 November 1987, the Kuching High Court made an order that the issue whether there was any debt due or accruing due, if any, and what amount, to the judgment debtor from the garnishee be tried. The parties then went ahead with the hearing. It would, therefore, be too late for the respondents/garnishee to raise an issue in the face of the arbitration clause in the said contract that the court has no jurisdiction to hear the matter.

If an authority is required on this point, we need only refer to the decision of this court in *Newacres Sdn Bhd v Sri Alam Sdn Bhd.*[4] In that case, the appellant raised a preliminary objection on cl 23 of the joint-venture agreement which provided for reference to arbitration in the case of any dispute or difference with regard to any clause, matter or thing whatsoever or the operation or consideration thereof or any matter connected with the agreement, or the rights, duties or liabilities of any of the parties. Jemuri Serjan CJ (Borneo), in delivering the judgment of the court and after considering the full citation of authority, addressed the issue in the following manner (at p 481):

> The real question for our determination is whether in the face of the provision of cl 23 the respondent is entitled in law to go to court instead of referring the dispute to arbitration, considering that it does not contain the '*Scott v Avery* clause'. *Dobb*'s case (1935) 53 CLR 643 itself would provide an answer to this case, particularly the part of the judgment which reads:
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> > 'What no contract can do is to take from a party to whom a right actually accrues, whether *ex contractu* or otherwise, his power of invoking the jurisdiction of the courts to enforce it. (*Kill v Hollister* (1746) 1 Wils 129; *Thompson v Charnock* 101 ER 1310; *Czarnikow v Roth, Schmidt & Co* [1922] 2 KB 478.) Accordingly, a contract providing for arbitration did not, apart from statute, prevent the institution of an action or suit, even although an actionable breach of contract was committed by the refusal to refer. (*In re Smith & Service and Nelson & Sons* [1890] 25 QBD 545 at p 544, per Bowen LJ.) But if, before the institution of an action, an award was made, it governed the rights of the parties and precluded them from asserting in the courts the claims which the award determined. By submitting the claims to arbitration, the parties confer upon the arbitrator an authority conclusively to determine them. That authority enables him to extinguish an original cause of action.'
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> This observation clearly supports the proposition that the respondent can still go to court, provided before the institution of an action, no award had been made by an arbitrator. In any case, cl 23 is never intended to oust the jurisdiction of the court under any circumstances, and we agree that in this case it is not the appellant's case that the court's jurisdiction was thus ousted.

A From what we have said earlier on in the judgment it is indisputable that the appellant did not object to the recourse to court by the respondent but went along throughout, not only filing affidavits in reply to the affidavits of the respondent when they filed the issues as ordered by Razak J but also filing the statement of defence and counterclaim. Such a conduct must, by its very nature, amount to a waiver of the rights of the parties to go to arbitration. Neither did B the appellant have recourse to s 6 of the Arbitration Act 1952 (Act 93) to apply for a stay of the proceedings thereby reinforcing the argument that it had abandoned its rights to go to arbitration, but submitted itself to the jurisdiction of the court. In any event, even if the appellant were to apply for stay of the proceedings in the High Court under s 6 of the Arbitration Act 1952, his application would fail for the reason that he had taken various steps in the C proceedings, and even had agreed for the case to be set down for trial 30 days from the date of the High Court order dated 19 June 1987.

For reasons stated above, we are of opinion that the order of the learned judge was wrong and this appeal must be allowed with costs. Accordingly, we set aside the order of the judge and make absolute the appellants' D garnishee orders nisi. We also order the deposit to be refunded to the appellants.

Appeal allowed.

Reported by Prof Ahmad Ibrahim

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